

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE
LITIGATION

MDL 1456

Master File No. 01-CV-12257-PBS

Judge Patti B. Saris

THIS DOCUMENT RELATES TO:

Rice v. Abbott Laboratories, et al., N.D.
Cal. Case No. C 02-3925 MJJ

Thompson v. Abbott Laboratories, et al.,
N.D. Cal. Case No. C 02-4450 MJJ

DECLARATION OF ROBERT D. SANFORD IN OPPOSITION TO MOTION TO
DISMISS BY DEFENDANT FUJISAWA USA, INC.

I, Robert D. Sanford, hereby declare:

1. I am an attorney licensed to practice in the State of California and of counsel with Moscone, Emblidge & Quadra LLP, counsel of record for Plaintiffs John Rice and Constance Thompson in the actions captioned above. I have personal knowledge of all matters set forth below and am competent to testify thereto.

2. On September 23, 2002, I wrote to Defense counsel in *Thompson*, including the attorneys representing Defendant Fujisawa USA, Inc., in attempt to resolve the issue of service of process. A copy of my September 23, 2002 letter is attached as Exhibit A and incorporated herein by reference. I requested that Defendants' counsel

advise whether they would accept service on behalf of their client, unless they agreed that the notice of removal was a general appearance that obviated the need for service.

3. While no defense counsel agreed that the notice of removal was a general appearance, some defense counsel replied to my September 23, 2002 letter with correspondence that stated that service was stayed by the *Thompson* court's order of October 30, 2002 staying all proceedings. For example, in a letter dated October 4, 2002, counsel for Defendant Bayer Corporation stated that "further action in regard to [my September 23] letter appears unnecessary," given the stay order. As another example, counsel for Defendant Aventis Pharmaceuticals stated in a letter dated October 10, 2002 that the issue of service was "currently moot in light of the Court's September 30, 2002 Order staying all further proceedings in this case." Copies of the letters from counsel for Bayer Corporation and Aventis Pharmaceutical are attached as Exhibits B and C, respectively, and incorporated herein by reference.

4. Counsel for Defendant Fujisawa USA, Inc. ("Fujisawa") also responded to my September 23, 2002 letter with a letter dated October 1, 2002, a copy of which is attached as Exhibit D and incorporated herein by reference. Fujisawa's attorney did not address the issue of the stay's effect, but advised that they were not authorized to accept service on behalf of their client.

5. The stays in *Rice* and *Thompson* were lifted on February 20, 2003, when Judicial Panel on Multidistrict Litigation ("JPML") denied *Rice* and *Thompson*'s motions to vacate the order conditionally transferring the actions to *In re Pharmaceutical Industry Average Wholesale Price Litigation*, MDL 1456 (the "AWP Litigation"). I understand that complaints in *Rice* and *Thompson* are superceded by the Master Consolidated

Complaint under Case Management Order No. 2, which is subject to a pending motion to dismiss. I also understand that no Defendant is obligated to respond to the *Rice* or *Thompson* complaints. In light of these circumstances, I believe that hat the issue of service could and should be deferred until a ruling on the motion to dismiss, or at least until 120 days after the transfer occurred. I believe that the dispositive motion to dismiss the Master Consolidated Complaint took precedence over subsidiary issues of when and what process was required in tag-along actions. However, any guidance from the Court to effect service in a manner coordinated with the AWP Litigation would be greatly appreciated.

6. When Fujisawa served its motion to dismiss without first contacting counsel for Rice and Thompson, I immediately attempted to resolve the issue of service without burdening the Court. After an exchange of voicemail messages, I spoke by telephone with Kathleen H. McGuan, Fujisawa's attorney, on April 7, 2003. Although I advised Ms. McGuan of the stays in *Rice* and *Thompson*, she refused to withdraw the motion to dismiss. She also refused to accept service on behalf of Fujisawa. I confirmed the April 7th phone conversation in a letter to Ms. McGuan dated April 14, 2000, a copy of which is attached as Exhibit E and incorporated herein by reference.

7. In response to my April 14 letter, I received a letter from Ms. McGuan, dated April 15, 2003, that is attached as Exhibit F and incorporated herein by reference. Ms. McGuan's letter reiterated Fujisawa's position that it would not withdraw the motion to permit resolution of the issue of service.

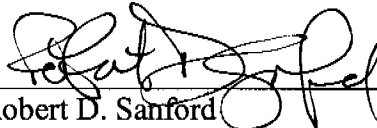
8. On April 16, 2003, I wrote again to Ms. McGuan in a final effort to obtain agreement on the time and manner of service in a manner coordinated with the other tag-

along actions in the AWP Litigation. A copy of my letter is attached as Exhibit G and incorporated herein by reference. I have not received a response from Ms. McGuan.

9. On April 17, 2003, I caused the original Complaints and Summonses in *Rice* and *Thompson* to be transmitted to a process server in Los Angeles for service on Fujisawa's authorized agent for service of process, CT Corporation Systems, in California. I anticipate that the proof of service will be filed shortly. With guidance from the Court, Rice and Thompson will take any other steps necessary to effect proper service on Fujisawa and all other unserved Defendants in a manner coordinated with other tag-along actions in the AWP Litigation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: April 17, 2003


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Re: Thompson v. Abbott Laboratories, Inc., et al.
United States District Court, Northern District of California
Case No. C-02-04450 CW

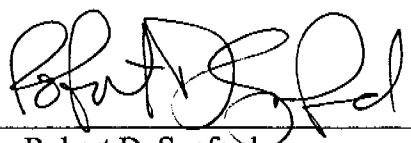
Dear Mr. Hasson:

We received the Notice of Removal filed by your client, Gensia Sicor Pharmaceuticals, Inc., and joined by the co-defendants listed in the enclosed attachment, who are receiving a copy of this letter. Setting aside the issue whether this action may be properly removed to federal court, we believe that the removal is a general appearance and thus obviates the need for service of process. We would appreciate receiving written confirmation by Wednesday, October 2, 2002 from each Defendant that it concurs with this position. If any Defendant contends that it has not appeared in this action, please advise us in writing by October 2 whether counsel will accept service on behalf of the Defendant.

Your attention to this matter is appreciated.

Very truly yours,

MOSCONE, EMBLIDGE & QUADRA, LLP

By 
Robert D. Sanford

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October 4, 2002

VIA FACSIMILE

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Re: Thompson v. Abbott Laboratories Inc., et al.
United States District Court, Northern District of California
Case No. C-02-04450 CW

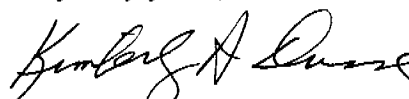
Dear Mr. Sanford:

On behalf of Bayer Corporation ("Bayer"), we wanted to respond your letter dated September 23, 2002, to Kirke M. Hasson, Esq. Please be advised that we do not concur with your position that a non-served defendant's consent to removal constitutes a general appearance obviating the need for service of process.

However, in light of the order from Judge Wilken staying all further proceedings in this case pending a decision by the Judicial Panel on Multidistrict Litigation ("JPML") regarding transfer of this case to the District of Massachusetts for consolidated pretrial proceedings, further action in regard to your letter appears to be unnecessary at this time. At such time as the stay is lifted or the district court or the JPML enters another appropriate order relative to the matter which requires addressing this issue, be advised that we will consider accepting service on behalf of Bayer provided Plaintiff agrees that Bayer is not required to answer or otherwise respond to the Complaint until sixty (60) days after the Court's ruling on a motion to remand in this action, or if Plaintiff decides not to file a remand motion, until sixty (60) days after we receive written notification of that decision.

Please advise in writing if this is acceptable to you.

Very truly yours,


Kimberly A. Dunne

cc: All Counsel on Attached Service List

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October 10, 2002

Robert D. Sanford, Esq.
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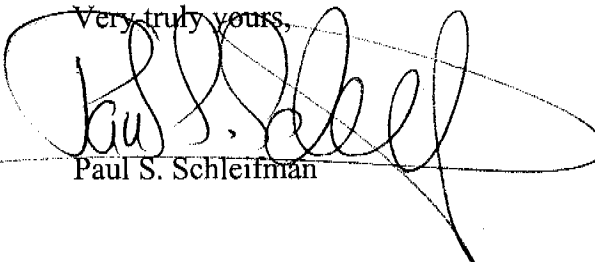
RE: *Thompson v. Abbott Laboratories, et al.*
United District Court Case No. C-02-04450 CW

Dear Mr. Sanford:

We represent Aventis Pharmaceuticals Inc. ("Aventis") and in that capacity have received your September 23, 2002 letter. You claim that Aventis has made a general appearance by participating in the removal and has, therefore, waived service of process of the Complaint. We respectfully disagree. The issue, however, is currently moot in light of the Court's September 30, 2002 Order staying all further proceedings in this case.

We will be happy to discuss this matter with you in more detail once the stay is lifted.

Very truly yours,



Paul S. Schleifman

PSS:jdt

BINGHAM MCCUTCHEN

October 1, 2002

Direct: (415) 393-2369
charlene.shimada@bingham.com

Our File No. 24682-0002

VIA FACSIMILE AND U.S. MAIL

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San Francisco, CA 94104-4238

Thompson v. Abbott Laboratories, Inc., et al.
Case No. C-02-04450 CW

Dear Mr. Sanford:

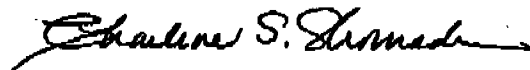
This will respond to your letter to Kirke M. Hasson, Esq., dated September 23, 2002. We do not agree with your position that removal of the above-referenced action to federal court constitutes a general appearance obviating the need for service of process on our client Fujisawa USA, Inc. ("Fujisawa"). Rather, the case law makes clear that a non-served defendant's consent to removal does not waive any jurisdictional defenses or objections to service of process. *General Inv. Co. v. Lake Shore & Michigan S. Ry. Co.*, 260 U.S. 261, 268-269 (1922) ("[I]t is well settled that a petition for removal, even if not containing [a reservation of the right to object to the sufficiency of service], does not amount to a general appearance, but only a special appearance, and that after the removal the party securing it has the same right to invoke the decision of the United States court on the validity of the prior service that he has to ask its judgment on the merits."¹).

¹ See also *Dielsi v. Falk*, 916 F.Supp. 985, 994 (C.D. Cal. 1996) (noting that a defendant does not waive jurisdictional challenges by removing case to federal court.); *DiCesare Engler Prods., Inc. v. Mainman Ltd.*, 421 F.Supp. 116, 121 (W.D. Pa. 1976) (noting that defendants' removal of action to federal court did not constitute waiver of defects in service of process).

Robert D. Sanford, Esq.
October 1, 2002
Page 2

Furthermore, we are not authorized to accept service on behalf of Fujisawa.

Very truly yours,


Charlene S. Shimada

Bingham McCutchen LLP
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April 14, 2003

Via Facsimile Only

Kathleen H. McGuan
Reed Smith
1301 K Street, N.W.
Suite 1100 – East Tower
Washington D.C. 20005-3373

**RE: In re Pharmaceutical Industry Average Wholesale Price Litigation,
MDL No. 1456, *Rice v. Abbott Laboratories, et al.*, N.D. Cal. Case No. C 02-
3925 MJJ, *Thompson v. Abbott Laboratories, et al.*, N.D. Cal. Case No. C 02-
4450 MJJ**

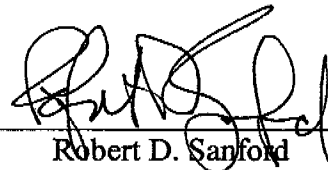
Dear Ms. McGuan:

This firm represents Plaintiffs in the *Rice* and *Thompson* matters referred to above. I write to confirm our phone conversation on April 7th in which you refused to withdraw the motion to dismiss Plaintiffs' complaints filed by Defendant Fujisawa USA, Inc. I advised you that the United States District Court for the Northern District of California had stayed all proceedings pending a ruling on Plaintiffs' motion to vacate the conditional transfer order transferring the cases to MDL Case No. 1456. Although you contend that "it is not the law" that the stay affected service of process, you offer no authority for your position which is not addressed in the motion. The law is to the contrary. *See, e.g., DeTie v. Orange County*, 152 F.3d 1109, (9th Cir. 1998).

This letter also confirms your refusal to accept service on behalf of Fujisawa, and that Fujisawa's motion to dismiss was served on by Federal Express on April 4, 2003. Under Local Rule 7.1(b), Plaintiffs' opposition to the motion is due on April 18, 2003.

Very truly yours,

MOSCONE, EMBLIDGE & QUADRA LLP

By 
Robert D. Sanford

cc: Edward Nortargiacomo, Esq.

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AD HOC BROADCAST REPORT for
Moscone, Emblidge & Quadra, LLP
415 984 0414
Apr-14-03 2:25PM

Job	Phone Number	Start Time	Pages	Mode	Status
101	12024149299.....	4/14 2:23PM.....	2/ 2	BC	Completed.....
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FACSIMILE COVER SHEET

Monday, April 14, 2003, 2:20 PM

TO: Kathleen H. McGuan FAX: (202) 414-9299
CC: Edward Nortargiacomo FAX: (617) 482-3003
FROM: Robert Sanford

RE: *Rice v. Abbott Labs, et al.; Thompson v. Abbott Labs, et al.*

MESSAGE: See attached correspondence.

We are transmitting a total of 2 pages, including this cover sheet. If you did not receive all of the pages or there is another problem, please call Norma Butler at (415) 362-3599, ext. 23.

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Kathleen H. McGuan • 202.414.9230 • kmcguan@reedsmith.com

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April 15, 2003

VIA FACSIMILE NO. (415) 362-7332
AND FIRST-CLASS MAIL

Robert D. Sanford, Esq.
Moscone, Emblidge & Quadra, LLP
180 Montgomery Street
Suite 1240
San Francisco, CA 94104-4230

**Re: In re: Pharmaceutical Industry Average Wholesale Price Litigation,
MDL No. 1456**

Dear Robert:

Thank you for your letter of April 14, 2003, regarding the *Rice and Thompson* cases, now transferred to the above-referenced multi-district litigation. I assume you will make whatever arguments you believe to be appropriate in an opposition to our motion filed with the Court and I will respond to them by filing a reply brief.

You correctly note that I will not accept service on behalf of Fujisawa USA, Inc. at this late date.

Fujisawa's Motion to Dismiss was served on March 25, 2003, in the manner ordered by the Court in its Case Management Order No. 2. We provided you with a copy of it on April 4, 2003, as a professional courtesy, when we learned that you had not subscribed to the Verilaw service as required by the Court's Order. Nevertheless, we have offered to extend the time for your clients to respond to the Motion to Dismiss until April 18, 2003.

Please contact me should you wish to discuss the matter further.

Sincerely,

REED SMITH LLP



Kathleen H. McGuan

KHM:clr

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Fax Machine No: (415) 362-7332Date: April 15, 2003Fax Machine
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Notes: In re: Pharmaceutical Industry Average Wholesale Price Litigation, MDL No. 1456

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April 16, 2003

Via Facsimile Only

Kathleen H. McGuan
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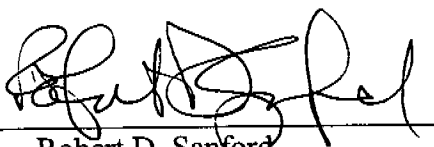
**RE: In re Pharmaceutical Industry Average Wholesale Price Litigation,
MDL No. 1456, *Rice v. Abbott Laboratories, et al.*, N.D. Cal. Case No. C 02-
3925 MJJ, *Thompson v. Abbott Laboratories, et al.*, N.D. Cal. Case No. C 02-
4450 MJJ**

Dear Ms. McGuan:

I received your letter of April 15, 2003. From our phone conversation, I understood that Fujisawa USA, Inc. will not withdraw its motion to dismiss in order to permit service of process to occur within an agreed timeframe and in a manner that is coordinated with the multitude of other actions in MDL No. 1456. If this is not the case, please contact me to discuss the matter.

Very truly yours,

MOSCONE, EMBLIDGE & QUADRA LLP

By 
Robert D. Sanford

cc: Edward Nortargiacomo, Esq.

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Moscone, Emblidge & Quadra, LLP
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Apr-16-03 2:30PM

Job	Phone Number	Start Time	Pages	Mode	Status
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FACSIMILE COVER SHEET

Wednesday, April 16, 2003, 2:26 PM

TO: Kathleen H. McGuan **FAX:** (202) 414-9299
CC: Edward Nortargiacomo **FAX:** (617) 482-3003
FROM: Robert Sanford

RE: *Rice v. Abbott Labs, et al.; Thompson v. Abbott Labs, et al.*

MESSAGE: See attached correspondence.

We are transmitting a total of 2 pages, including this cover sheet. If you did not receive all of the pages or there is another problem, please call Norma Butler at (415) 362-3599, ext. 23.

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